No. 7013

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED STRANGIO and TOM STRANGIO, doing business as Strangio Bros., and HAROLD LESLIE and JAMES C. BENSCHOTER,

Appellants,

vs.

CONSOLIDATED INDEMNITY AND INSURANCE COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

This suit in equity was brought to secure a decree cancelling a public liability automobile insurance policy, upon the ground that its issuance was obtained through fraud and concealment. The Court found all the allegations of the complaint to be true (Tr. 61) and entered a decree cancelling the policy. (Tr. 67-68.) This appeal followed. The statement of facts in appellant's brief is in the main correct, but is adroitly drawn so as to array and present those facts in a manner best calculated to support the theories upon which appellant relies. We therefore deem it necessary to make a statement of the essential facts in the case, as follows:

I.

APPELLEE'S STATEMENT OF FACTS.

Appellee, a New York corporation doing business in California, wrote automobile public liability insurance. Netherlands Insurance Company, also doing business in the State of California, wrote fire, theft and collision insurance, but did not write public liability. Both companies had their offices in San Francisco. At all times here involved, Pierce J. Deasy was underwriter and manager of appellee company at San Francisco. Prior to the issuance of the policy in suit, an arrangement was entered into between Mr. Deasy, representing the appellee company, and Mr. Gorham, representing the Netherlands, whereby the Netherlands Insurance Company was to offer as broker to appellee such public liability insurance as it chose, and on which the appellee company paid the Netherlands Insurance Company the same brokerage as would be paid to any other licensed broker. (Tr. 76-77, 88-89.) Inasmuch as appellants have *ex industria* made an agreement of agency out of this arrangement, with a right on the part of the Netherlands Company, as agent, to bind the Consolidated, and further contend that knowledge on the part of Netherlands Company is constructively that of the appellee, the precise facts, circumstances and the conversation under which the arrangement was effected becomes important.

This arrangement was made in a conversation between Mr. Deasy and Mr. Gorham, and we quote from the testimony of these two gentlemen, as follows:

Mr. Deasy testified:

"I had some dealings with the Netherlands Insurance Company as represented by Mr. Gorham of that company. Mr. Gorham asked if my company would be interested in public liability and property damage automobile insurance for his office. He stated that the Netherlands Insurance Company did not write public liability insurance, although they did write property damage insurance. We talked about the matter—talked about it from the standpoint of underwriting and from the standpoint of remuneration —what it would pay the Netherlands Insurance Company as brokers on such business, and I indicated to Mr. Gorham that I was interested in such business but that it must be underwritten and entirely controlled by our own office and that we would have to have the full direction and control of our underwriters. Mr. Gorham said that that was acceptable to his company and that he was only interested in the service which my company could give his company. We then spoke of the brokerage remuneration to be paid them and when that was agreed to the arrangement went into effect. In the course of this conversation I told Mr. Gorham that it was impossible to allow the Netherlands Insurance Company to issue cover notes in our behalf. After this conversation the arrangement went into effect. The Netherlands Insurance Company offered us insurance from time to time and we generally accepted it, though some was rejected after investigation. We paid the Netherlands the regular brokerage on business which we accepted. The remuneration paid the Netherlands was on

the same brokerage basis as would be paid to any other licensed broker."

(Tr. 76-77.)

Mr. Gorham testified regarding the same conversation:

"The purpose of the conversation was to place the public liability insurance which my company cannot write, and which was given to us by our agents or brokers. I asked Mr. Deasy if the Consolidated Indemnity and Insurance Company would be open for such business as we might offer them. I told him that the business was public liability insurance where the assured would want public liability, property damage, fire, theft and collision insurance on automobiles. I said we would write the fire, theft and collision and that the property damage and liability would be placed with them, if acceptable, and that we would phone them as it came to our office. He agreed to the proposition. I did not ask him to act as broker for his company or agent for the company. I just asked him if he would take the business we offered. We agreed my company would get the regular broker's commission. Afterwards the manager of my company approved of the arrangement and policies were placed with (by) the Netherlands Insurance Company under this arrangement, they paying us a commission on the premium. We always phoned this business to the Consolidated and Indemnity Insurance Company and they would send us the policy if acceptable to them, after which we would mail it to our broker or agent."

(Tr. 88-89.)

It was not, as stated by appellant (Br. p. 2), the invariable custom for appellee to date back public liability policies issued under this agreement with the Netherlands Insurance Company as of the date of the application.

Mr. Deasy testified:

> "It was not a general custom for our company to issue policies effective as of the date of the application when several days intervened between the application and the date of the policy, but this was done in many cases, and you might term it a custom of the company to do that, but not on a large scale, however."
> (Tr. 83.)

Such being the relation of the Consolidated and Netherlands, one, Emile L. Matthias, a Southern Pacific clerk at Stockton, California, had at some prior time been a licensed agent for the Netherlands Company. (Tr. 103.) He was not and never had been an agent of appellee. He had never heard of that company. (Tr. 103.) Nor had that company ever heard of him. (Deasy, Tr. 76.) On the 18th of October, 1930, Matthias was not licensed as an agent or broker. (Beckett, Tr. 75; Matthias, Tr. 104.) Appellants Strangio Bros., had owned the car in question for some time. It had been insured prior to the accident, but the insurance had expired in the spring or early summer of 1930. (Matthias, Tr. 104, 105.) On October 18, 1930, at about noon time, Tom Strangio told Matthias to "go ahead and get the insurance." (Strangio, Tr. 101; Matthias, Tr. 103.) Matthias had been trying to get the insurance on

the Strangio car for about two weeks. (Matthias, Tr. 103.) It is certainly a peculiar circumstance that an attempt should be made to insure this car, which had been uninsured for several months, the day before this serious accident occurred. Matthias then made out what is known as a "daily report." (Tr. 103, Compl. Ex. No. 2.) This is on a form of the Netherlands Casualty Company, and is in fact an application for public liability and property damage insurance on the automobile in question. (Tr. 111, 112.) This application was mailed to the Netherlands Insurance Company the following Sunday morning, sometime before noon. (Tr. 104.)

On Sunday afternoon around two or two-thirty P. M., the car to be covered under this application was in a serious accident causing personal injuries and property damage to such an extent that liability was imposed on Strangio Bros. to the extent of eleven or twelve thousand dollars.

One of the Strangios phoned news of the accident to Matthias about three-thirty or four P. M. the same day. Notwithstanding the fact that Matthias, as he swore, considered himself an agent for the Netherlands (Tr. 108), he took no steps to notify that company of the accident until Monday night, October 20th, at which time he wrote the letter, Plaintiff's Exhibit No. 1. (Tr. 90, 91.) Even this belated communication was not mailed until Tuesday morning, probably about 8:00 o'clock. (Tr. 105.) It did not reach the Netherlands office on Wednesday, the 22nd, until after the policy had been mailed to Matthias.

In the meantime, the application was received at the Netherlands office Monday, October 20th. The Netherlands telephoned to appellee's office requesting the policy and giving the necessary data for its issuance. It was issued, delivered to the Netherlands on either October 20th or 21st, and immediately mailed to Mr. Matthias at Stockton. The letter advising of the occurrence of the accident, Plaintiff's Exhibit No. 1, was received at the Netherlands' office on October 22nd and its contents communicated to appellee. (Tr. 89.) On October 29, appellee gave notice to appellants Strangio of rescission of the policy upon the ground of fraud and concealment. (Exhibit 4, Tr. 99.)

Upon these facts appellee contended in the Court below and contends here:

1. Appellee's arrangement with the Netherlands Insurance Company was a mere brokerage arrangement. It in no sense constituted the Netherlands Insurance Company an agent of appellee to any extent or for any purpose whatsoever. Hence, Netherlands was agent for Strangio Bros. and not for appellee.

2. That Matthias, being unlicensed under the laws of the State of California, could not be an agent for any insurance company; if he was an agent for anyone in the premises, it must have been for Strangio Bros.

3. That if he is held to be an agent of anyone other than Strangio Bros., it could only be of the Netherlands Insurance Company, and not of appellee.

4. That in no event was his knowledge the knowledge of, or binding upon appellee.

5. That Matthias, as appellants' agent, did not use due or reasonable diligence to communicate knowledge of the loss to the insurer; had he exercised the same degree of diligence in communicating news of the loss that he exercised in transmitting the application, it would have reached the Netherlands' office and been communicated to appellee on Monday morning before the policy was issued; certainly before it was transmitted to him at Stockton.

Appellants, on the other hand, have erected their case upon the theory that:

1. The Netherlands Insurance Company was an agent of appellee, with power to bind it, and that knowledge of Netherlands Insurance Company was constructively the knowledge of appellee.

2. That Matthias was an agent of Netherlands Insurance Company, with power to bind it, and knowledge of Matthias was the knowledge of the Netherlands and therefore also the knowledge of appellee; hence Matthias having knowledge of the happening of the accident prior to the issuance of the policy, his knowledge was the knowledge of appellee, and there was no concealment.

We will address ourselves to a demonstration of the correctness of appellee's position, both in law and in fact, and in the course thereof or later answer the various points made in appellants' brief.

II.

FINDINGS OF THE COURT BELOW.

Preliminarily, we desire to call the Court's attention to the fact that the Court below found all of the allegations of appellants' complaint to be true. While in the main the evidence is without conflict, in so far as there may be a conflict, this Court should accept the findings of the Court below upon conflicting evidence.

New York Life Insurance Company v. Simons, 60 Fed. (2nd) 30;

Karn v. Andreson, 60 Fed. (2nd) 427.

III.

THE LAW APPLICABLE.

Unless appellants' theory of agency of Matthias for the Netherlands and the Netherlands for appellee can be sustained, and it be held to follow as a matter of law that Matthias' knowledge of the loss is the knowledge of appellee, we do not think it can be (and, as we read appellants' brief, it is not) seriously contended, but that there was fraud and concealment in this case sufficient to vitiate the policy.

In appellants' brief and in some of the cases cited therein, it is asserted that the law relating to concealment has been somewhat relaxed with respect to fire, life and other forms of insurance. That is undoubtedly true in some jurisdictions, but not in California. The State of California by statute has made the strict rule of maritime law regarding concealment

on policies of marine insurance applicable to all forms of insurance.

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event."

C. C. 2527.

"Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter."

C. C. 2531.

"A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."

C. C. 2561.

"A concealment, whether intentional or unintional, entitles the injured party to rescind a contract of insurance."

C. C. 2562.

"Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

C. C. 2563.

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom

the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

C. C. 2565.

There are no exceptions as to the application of these sections; they apply to all contracts of insurance, regardless of its character, in the State of California. They are a codification of the *uberrimae fidei* rule which has been stated innumerable times, usually respecting marine insurance. The leading and one of the earliest cases was decided by Lord Mansfield years ago, wherein he said:

"It may be proper to say something in general of concealments which avoid a policy. Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void because the risk run is really different from the risk understood and agreed to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed anything, as if he insured a ship on the voyage which he privately knew to be arrived, and an action would lie to recover the premium. The governing principle is applicable to all contracts in fair dealings. Good faith forbids either party, by conceal-

ing what he privately knows to draw the other into a bargain from his ignorance of that fact, and his believing the contrary."

Carter v. Boehm, 3 Burr 1905-97, English Reprint, 1162.

In an early Pennsylvania case it was said:

"The contract of insurance is eminently a contract of good faith. When the insurer relies on the representations of the insured, he is entitled to the benefit of every material fact within the exclusive knowledge of the applicant. Not to his surmises, opinions and fears, but to the specific facts, if material, on which they are founded, in order that he may judge for himself; and this too, whether the insured believes these facts to be material or not, or whether they are undisclosed by accident or design."

Smith v. Columbian Ins. Company, 17 Pa. St. 283, 55 Am. Dec. 546.

The Supreme Court of the United States, speaking through Chief Justice Marshall, has also said:

"The contract of insurance is one in which the underwriters generally act on the representations of the assured, and this ought consequently to be fair, and to omit nothing which it is material for the underwriters to know, and fair dealing requires that he should state everything which would influence the mind of the underwriter in forming or declining a contract. A building held under lease about to expire might be spoken of as the building of the tenant, but an offer for insurance stating this would be a gross imposition."

Columbian Insurance Company v. Lawrence, 2 Peters (27 U. S.) 25, 7 Law. Ed. 335.

and in a recent decision the Circuit Court of Appeals of the Second Circuit said:

> "Concealment consists in the suppression by the insured of any fact or circumstance which the underwriter does not know or is not legally presumed to know, and which is material to the risk, or which could possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risk or what his premium would be if he desired to accept it. * * * Such a concealment avoids a contract, whether it be due to fraud, negligence, accident or mistake, for the insured is bound to disclose to his underwriter with the utmost candor and frankness all circumstances which would throw light on the nature and perils of the adventure he seeks to insure."
>
> *Btesh v. Royal Insurance Company Ltd. of Liverpool,* 40 Fed. (2nd) 659, affirmed, 49 Fed. (2nd) 720.

In short, the declarations of the Courts respecting this rule have been uniform for well over a century. The strict rule of *uberrimae fidei* laid down by these cases is made the law of the State of California by the code sections above cited.

This contract was made in California, the policy was issued in California, and delivered in California. It is governed by California law.

> *Equitable Life v. Clements,* 140 U. S. 226, 11 Sup. Ct. 322, 35 L. Ed. 497;
>
> *Fidelity Mutual Life Association v. Jeffords,* 107 Fed. 402;

Langley v. Prudential Insurance Company of America, 271 Fed. 776;

Aetna Life Insurance Company v. Geher, 50 Fed. (2nd) 657;

Nonantum Investment Company v. Maryland Casualty Company, 56 Fed. (2nd) 329.

It therefore inevitably follows that unless a chain of agency can be worked out whereby Matthias, although unknown to appellee and appellee unknown to him, although unlicensed and therefore unable to legally function as an insurance agent at all, was *non constat* a general agent of appellee, with general powers to bind it, there was a concealment of an admittedly material fact (Tr. 99) entitling appellee to rescind. In order to establish such agency, it must of course first be established that Netherlands was not a mere broker, and hence an agent of the assured, but a general agent of appellee with general powers, and not only that, but further, that all of its sub-agents (assuming Matthias to be one) were likewise agents of appellee with equal authority and similar powers.

Unless such agencies can be established under the facts of this case, both Matthias and Netherlands were agents of Strangio Bros., there was concealment; and appellee is entitled to the decree entered in the Court below.

Solomon v. Federal Ins. Co., 176 Cal. 133;

General Acc. Assurance Co. Ltd. v. Caldwell, 59 Fed. (2nd) 473.

IV.

MATTHIAS, BEING UNLICENSED, WAS NOT AND COULD NOT BE AN AGENT FOR EITHER OF THE INSURANCE COMPANIES.

Prior to July, 1930, it appears that Matthias had been a soliciting agent of the Netherlands Insurance Company in Stockton. His license had been terminated on June 30, 1930, and had not been renewed. The law of California effective at the time the policy was written defined an agent as follows:

> "No person shall within this state act as agent of any insurance or surety company or other insurer, until such person shall have first obtained a license from the Insurance Commissioner authorizing him so to act. Any person duly appointed and authorized by an insurance or surety company or other insurer to solicit applications for insurance or surety bonds or effect insurance or surety bonds in the name of such company or other insurer shall be an agent within the meaning of this section. * * *."

The same section denounces acting as an agent without such license as a misdemeanor.

Cal. Pol. Code, Sec. 633.

The fact is undisputed that Matthias was unknown to the appellee, and that appellee was also unknown to him. Furthermore, the evidence does not show that he had ever had authority to "effect insurance or surety bonds in the name of" the Netherlands nor any other company, although it does appear that he had at *some time in the past* been authorized to *solicit applications* for insurance on behalf of the Netherlands.

If as a matter of law he solicited the Strangios' application as agent for the Netherlands, he committed a misdemeanor. We therefore contend that if he was an agent in this transaction for anyone, he must have been an agent for Strangio Bros., not in the sense of being an insurance agent, as contemplated by the statute, but a mere volunteer arranging the insurance for them. This follows from the presumption that his act was lawful and not unlawful.

Maryland Casualty Company v. Industrial Accident Commission, 179 Cal. 716.

There is nothing inconsistent with this theory in the two decisions cited by appellant. Both cases differ widely from this case. First, in neither of them is it held that the knowledge of a non-licensed "agent" is the knowledge of the insurer, and secondly, they are both based upon the principle of estoppel. In each case the insurance company knowingly accepted an application secured through an unlicensed agent, and in neither did the insured know of such non-licensure. Hence the company was held estopped to take advantage of its own illegal act and deny the contract thus made. In the first case cited by appellant, *Goldstone v. Columbia Life Insurance Company,* 33 Cal. App. 119, one Levy, a regular authorized and licensed agent of the New York Life Insurance Company, visited Bernsten, the acknowledged and admitted general agent of the defendant, Columbia Life Insurance Company; Bernsten requested Levy to act as the agent of the Columbia Life Insurance Company, but was informed by Levy that he could not do so on account of his connection with the New York Life Insurance

Company, whereupon Bernsten, in order to get around and evade the law, proposed as follows:

> "Well, make the contract in the name of your wife, make her the agent and you can be the active man in obtaining the business, whatever it is."

Levy continued:

> "Under those circumstances we entered into an agreement whereby this business was to be solicited by myself, but Mrs. Levy was to be known as the agent, in order not to conflict with the contract that I had with the New York Life Insurance Company."

Mrs. Levy was thereupon appointed such agent, and Mr. Levy, in accordance with his agreement with Bernsten, proceeded to solicit insurance and secured the application for insurance from Goldstone, upon which the policy was issued that was involved in the accident. (33 Cal. App. 121.) The Court held that the company could not take advantage of its own wrong and deny Levy's agency. A clearer case of estoppel cannot well be imagined. The opinion of the Court shows this wherein it is said:

> "No company should knowingly fail to regard its requirement, nor should any person assume to act as agent or solicitor without said power of attorney and said license."

Had the appellee here connived with Matthias to act as its agent without obtaining a license, the *Goldstone* case would be applicable, but under the facts of this case, where the company issuing the policy did not know Matthias and had never heard of him, and

never saw the application, it certainly cannot be held estopped to deny his unlawful,—indeed, criminal act, in soliciting insurance, nor can it be bound by communications made to him.

The case of *Frasch v. London & Lancashire Fire Insurance Company,* 213 Cal. 219, is even more beside that point. All that case holds is that payment of a premium to an unlicensed agent is binding upon the company. Stated another way, it holds that one need not be a licensed insurance agent under Section 633 of the Political Code to collect premiums upon a policy. The case went off on demurrer, and it appears from the opinion that the complaint alleged that the plaintiff was unaware of the non-licensure of the agent, although it was within the defendant insurance company's knowledge at the time it issued the policy. The demurrer, of course, admitted these facts, and the situation presented was therefore the same as in the *Goldstone* case.

We have been able to find no case in the State of California holding that an insurance company is bound by the act of some person unknown to it who has without its knowledge unlawfully purported to act as an insurance agent, and through the intermediacy of others secured the issuance of a policy.

V.

THE NETHERLANDS INSURANCE COMPANY WAS A MERE BROKER IN THIS CASE AS TO THE PUBLIC LIABILITY INSURANCE. IT WAS NOT AN AGENT FOR APPELLEE TO ANY EXTENT WHATSOEVER.

There is no question but that appellee *could* have appointed the Netherlands as its agent with power to employ subagents, issue cover notes or "binders" and write policies. It could have done all of these things, *but it did not.* From the testimony of Mr. Deasy quoted *ante* (p. 3) it will be noted:

1. In the initial discussion between Deasy and Gorham, the compensation of the Netherlands as brokers was discussed.

2. Deasy said he was interested in such business as the Netherlands could offer, but that it must be underwritten and entirely controlled by appellee's office, and that appellee would have to have the full direction and control of the underwriting.

3. Mr. Gorham said that was acceptable, that he was only interested in the service which appellee could give.

4. Deasy expressly refused to allow the Netherlands Insurance Company to issue cover notes and no authority of any kind or character was conferred upon it.

5. After the arrangement was in effect, the Netherlands offered appellee insurance from time to time, which was generally accepted, although some of it was rejected. In other words,

the Netherlands was a mere offering broker. The appellee did not bind itself to accept all of the business offered by the Netherlands nor, indeed, to accept any part of it.

6. The Netherlands was not bound to give appellee all or any particular part of the public liability business it received.

7. The same brokerage commission was paid to the Netherlands as would be paid to any other licensed broker.

8. There was absolutely no difference between the manner in which the appellee dealt with the Netherlands Insurance Company under the arrangement and that in which it dealt with any other broker. (Tr. 86.)

The testimony of Mr. Gorham quoted ante is precisely in line with the testimony of Deasy. The relation thus established is singularly free from the vagueness and uncertainty usually found in cases where legal relationships are established through informal conversation. Had these gentlemen had a formal agreement drawn by counsel, they could not have more clearly established the relationship of principal and broker. It may here be noted in passing that under the express provisions of the law of California, an insurance company does not require a license to act as either agent of another insurance company or as a broker.

It is of the utmost importance, in considering appellants' contentions, to bear in mind that the stat-

utes of the various states relating to insurance brokers and agents are widely divergent, and therefore that cases arising under these statutes may be marshalled so as to support almost any theory desired.

Thus, in Indiana a broker is the agent of the one for whom he receives his compensation. Cf. Vol. 6, February number of the Temple Law Quarterly, page 259. The case of *Indiana Insurance Company v. Hartwell,* 123 Ind. 177, 24 N. E. 100, was based upon this theory.

A Wisconsin statute declares every person who solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, who transmits an application for a policy or makes any contract for insurance or collects any premium for insurance, or in any manner aids or assists in doing either or in transacting any business of a like nature, or advertises to do any such thing, to be an agent of the corporation to all intents and purposes, unless it can be shown that he received no compensation for such services.

A Nebraska statute makes all brokers soliciting insurance agents of the company and not of the insured.

Ordinarily, an insurance broker employed to procure insurance for another is not the agent of the company, but is the agent of the insured as to all matters within the scope of his employment.

International Paper Company v. General Fire Assurance Company, 263 Fed. 363.

and as stated by this Court recently:

> "A soliciting agent or broker is usually the agent of the insured in negotiations for the policy, but when the policy is delivered to the insured that agency terminates. In future dealings between the insured and the insurer through the broker, whether the broker is acting for the insured or as agent of the insurer will depend on the special circumstances proved."
>
> *General Acc. Assurance Co. Ltd. v. Caldwell,* 59 Fed. (2nd) 473.

This Court will doubtless recall that the above case did not involve a concealment, but the question whether a notice of loss given to a broker constituted notice to the company. Upon the facts of that case the notice was held sufficient.

Also, in *Park v. Fidelity & Casualty Company of New York* (Mo.), 279 S. W. 246, it is said:

> "Generally an insurance broker is the agent of the assured and not of the insurer, and, after procuring a valid contract, is the agent of neither party. (Citing cases.) But the ultimate decision as to which party the broker represents must depend upon the facts in each particular case. (Citing cases.)"

And, it may be added, such decision is necessarily also subject to the law of the state in which the transaction occurred.

In its essence, the arrangement was that the Netherlands would offer the appellee, *when it wished to do so,* public liability risks received by the Nether-

lands office in San Francisco; that the appellee would accept such of those risks as it chose to accept and reject the others; that upon those accepted it would pay the usual brokerage commission upon the same terms as it paid commission to other brokers; that appellee gave the Netherlands no authority whatsoever to speak or act for it. The fact that appellee delivered its policies through the Netherlands or received its premiums through the Netherlands' office is of no moment. The testimony shows that all insurance is handled in that manner between brokers and companies in San Francisco. (Tr. 85.) The quantity of business done does not change the relations of the parties. If the Netherlands was a broker under its original arrangements with appellee, it remained a broker. The fact that it brokered a part or all of its business with appellee does not transmute it from a broker representing the assured to an agent representing the company. If upon this state of facts, the Netherlands was an agent of appellee, then every insurance broker in California is an agent of the company with which he brokers his business, and such company is bound by his act and his knowledge is its knowledge. Such is not the law of the State of California.

Solomon v. Federal Insurance Company, 176 Cal. 133.

(We reserve the discussion of appellant's attempt to distinguish this case for a future subdivision of this brief. To hold the Netherlands an agent of Consolidated would be to import the rule of the Nebraska and Wisconsin statutes adverted to *(ante)* into this

state, in spite of the fact that the Supreme Court of this state has declared a different rule.

VI.

NO AUTHORITY WAS VESTED IN THE NETHERLANDS TO APPOINT SUB-AGENTS WITH POWER TO BIND APPELLEE.

Entirely apart from the proposition heretofore considered; namely, the illegality of Matthias' alleged agency by reason of his non-licensure, the lack of knowledge thereof on the part of appellee, the resulting lack of estoppel, and the controlling fact that Netherlands was a mere broker, the record negatives any authority vested by appellee in the Netherlands to appoint sub-agents or to confer authority upon them in appellee's behalf. To discuss this point at all, we must first make the violent assumption that the Netherlands was not a broker but an agent for appellee with general powers, so that had Strangio telephoned the news of the accident on Sunday afternoon to the Netherlands' office instead of to Matthias, it would in law have been the knowledge of appellee, and there would have been no concealment. So assuming for the purpose of argument, still there is no evidence whatsoever in the records that appellee conferred upon the Netherlands power to delegate such authority to any person whomsoever. The question of the right of an agent to appoint sub-agents is controlled in this state by California Civil Code Section 2349, which provides:

> "An agent, unless specially forbidden by his principal to do so, can delegate his powers to an-

other person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical;

2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;

3. When it is the usage of the place to delegate such powers; or,

4. When such delegation is specially authorized by the principal."

If authority to delegate in this case is found under the foregoing section at all, it must be in subdivision 4, as a delegation having been specially authorized by the principal. There is not a scintilla of evidence that appellee ever authorized Netherlands to delegate any authority to its agents whatsoever. The mere fact that Mr. Deasy "knew," using the word in the sense of "understood," that the Netherlands had agents and that such agents were *soliciting* the insurance which the Netherlands was brokering with appellee (Tr. p. 79), would not constitute an authorization to the Netherlands to delegate any power to such agents to bind appellee. And no act or agreement of such sub-agent would bind appellee. This is the expressly declared law of this state under Section 2350, which provides:

"If an agent employs a sub-agent without authority, the former is a principal and the latter is his agent, and the principal of the former has no connection with the latter."

also,

Bank of California v. Western Union Telegraph Co., 52 Cal. 280.

Neither is there any evidence whatsoever in the record of any custom or usage to the effect that subagents or soliciting agents of brokers should have any binding power upon the company ultimately issuing the policy. All that the record shows is that Deasy knew that public liability insurance was not written "over the counter;" that it was usually *secured* through soliciting agents. This falls far short of a custom or usage that would make all the subagents of the Netherlands Insurance Company agents of appellee, with binding powers, even if the Netherlands was an agent of appellee and not a mere broker.

Appellants state their proposition on page 10 of their brief thus:

> "Matthias was the agent of Consolidated either through the general custom of accepting liability insurance, the application for which was received by any agent of Netherlands, or by ratification by its act of issuing the policy dated as of the date when Matthias made out the application."

Leaving the question of ratification for future consideration, our answer to the first point is threefold:

1. As heretofore pointed out, there is no evidence of any general custom or usage such as appellants assert and apparently rely upon.

2. The cases cited in support of the proposition as stated by appellant (Br. pp. 10-20) are based upon statutes of other jurisdictions, or upon custom and usage; and

3. The rule which appellant invokes and attempts to state has been expressly repudiated in California.

At page 10 of their brief, appellants cite in support of this proposition a *part* of a section of Cooley's Brief on Insurance, Volume V, pages 4060-4062. It is only necessary to continue the quotation to show its inapplicability to this particular case. It is as follows:

> "It may be noted that in the Alkan, Bliss & Sias cases (cases cited in support of the portion of the text quoted in appellant's brief) the doctrine was perhaps to some extent based on *statutes* making persons aiding an applicant in procuring insurance the agents of the insurance company. In the McElroy and Union Bank cases, emphasis was laid on the fact that it was *customary* for insurance agents to place with agents of other companies part of the insurance applied for. * * * *A doctrine contrary to the one stated is applied in Parrish v. Rosebud Mine & Mill Company,* 140 Cal. 635, 74 Pac. 312 (affirming 71 Pac. 694). The California court in that case took the position that an insurance agent who receives an application for insurance and takes it to the agent of another company, who writes the insurance and divides the commission with him, is not the agent of the insuring company, so as to make his knowledge of erroneous recitals in the application the knowledge of the company. *This decision was no doubt based on the fact that it did not appear that the insurance company knew of any claim of the agent receiving the application to represent them as agents, or, indeed, anything about him, except that, as agent for other companies, he had the custody of the written application referred to in its policy.* The contrary doctrine seems also to have been applied in Wisotzkey v. Hartford Fire Insurance Com-

pany, 112 App. Div. 596, 98 N. Y. S. 763, affirmed in 189 N. Y. 532, 82 N. E. 1134 * * *." (Italics ours.)

The *Parrish* case is on all fours with this case upon the facts and should be conclusive upon the point, and therefore upon this case.

It may be noted in passing that the rule appellant seeks to apply is, in part at least, based upon the proposition of the first agent receiving a part of the premium as the commission. As stated in the portion of the section from Cooley quoted in appellant's brief, the rule is *especially* applicable if the agent soliciting the insurance receives a part of the premium as a commission. In this case, there was no premium collected and no commission paid. If there had been a premium, and a commission, there is not a scrap or scintilla of evidence that Matthias would have received any part of it. The fact that he had previously received part of the premium as commission during the period of his licensure as agent of the Netherlands raises no presumption that the Netherlands would have violated the law by dividing its commission with an unlicensed person. Beyond all this, there is no evidence that appellee knew of any intention on the part of Netherlands to pay him a commission, and it is certainly not bound by Netherlands' secret intention to pay such commission, if Netherlands had any secret intention of so doing.

The cases cited by appellant in support of the point now under discussion; namely, *McElroy v. British American Assurance Company,* 94 Fed. 990;

Palatine Insurance Company v. McElroy, 100 Fed. 391; *Queen's Insurance Company v. Union Bank and Trust Company,* 111 Fed. 697; *May v. Western Assurance Company,* 27 Fed. 260; *California Reclamation Company v. New Zealand Insurance Company,* 23 Cal. App. 611; *Insurance Company v. Hartwell,* 123 Ind. 127, and other cases cited in these decisions, all belong in a class of cases in which as pointed out in the portion of the section from Cooley heretofore quoted, the decisions are based either upon statutes or upon the fact that there was an established custom for insurance agents to place with agents of other companies part of the insurance applied for.

An examination of these cases will show that they are all cases where *a general agent* with *general powers,* dealing with other *general agents* with *general powers,* pursuant to an *established local custom or usage,* divided up risks and placed part of the risk in other companies. Other companies under this custom accepted such risks. All that these cases hold is, that in so doing, the insurer, knowing that such risks came pursuant to the custom and usage from the other general agents made such other general agents its agents for the purpose of handling the insurance. There is no evidence in the record of any such custom or usage in San Francisco for the interchange of public liability insurance business between insurance companies.

The practice of general agents splitting risks with other general agents arises in the placing of fire and marine risks where, from the nature of the risk and

size of the policy, no single company consistent with good business practice would write the entire risk.

Had there been any such custom shown to exist in San Francisco in respect of public liability insurance on automobiles, the rule would still be inapplicable to this case, for the reason that this policy was not issued by appellee under or pursuant to any custom or usage, but under and pursuant to the express agreement with the Netherlands making the Netherlands a broker for the assured and not agent for appellee in placing these policies.

Furthermore, had there been evidence of such custom and usage, it must necessarily be held that the Netherlands and appellee contracted with reference to such custom and made and established their relations as that of principal and broker, and not principal and agent, for the express purpose of eliminating all question of such custom and usage from their relations. It is a familiar rule that custom and usage never prevail over the terms of an express contract. 17 *C. J.* 508 and cases cited.

It is furthermore submitted that the case of *Solomon v. Federal Insurance Company,* 176 Cal. 133, is conclusive upon this point.

The plaintiff in that case made an oral application to one Bishop for insurance upon his automobile in Bakersfield. Bishop turned this information over to his San Francisco correspondents, Gordon & Hoadley, with the request that they secure the insurance but not mentioning any particular company. Gordon & Hoadley made out a formal application containing

certain statements descriptive of the car to be insured. Gordon & Hoadley were general agents for several insurance companies, but not the defendant company. A loss followed. Defendant disclaimed liability on the ground that the automobile destroyed did not correspond with the one described in the policy. The Supreme Court held the misrepresentation in the application to be material. The trial Court had found that Gordon & Hoadley were agents for the Federal Insurance Company. The Supreme Court declared the finding not sustained by the evidence, and further said:

> "As already indicated, the evidence shows that Gordon & Hoadley were not the regular agents of appellant, that they had never represented appellant before or since, and that this particular transaction was the only one in which Gordon & Hoadley and appellant ever had any dealings. Moreover, it was established that Bishop represented the plaintiff, and that Gordon & Hoadley were Bishop's San Francisco correspondents, who made out the application solely at his request, and that appellant knew nothing of the entire transaction until the application was placed in its hands by Gordon & Hoadley. It is well settled that where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker. (Parrish v. Rosebud M. & M. Co., 140 Cal. 635, 645 (74 Pac. 312); Mahon v. Royal Union Mut. Life Ins. Co., 134 Fed. 732 (67 C. C. A. 636); McGraw Woodenware Co. v. German Fire Ins. Co., 126 La. 32

(20 Ann. Cas. 1229, 38 L. R. A. (N. S.) 614, 52 South. 183), and cases cited.) The law in this state goes further and holds the insured responsible for misrepresentations in the application when it is drawn by a regular soliciting agent of the insurance company as in the policy here, such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact. (Elliott v. Frankfort Marine etc. Ins. Co., 172 Cal. 261 (L. R. A. 1916F, 1026, 156 Pac. 481); Madsen v. Maryland Casualty Co., 168 Cal. 204 (142 Pac. 51); Sharman v. Continental Ins. Co., 167 Cal. 117, 125 (52 L. R. A. (N. S.) 670, 138 Pac. 708); Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 749 (13 L. R. A. (N. S.) 866, 91 Pac. 609).)

It does not alter the case that Gordon & Hoadley retained a commission for placing the insurance. Bishop, who admittedly was not appellant's agent, also shared in the commission, and it conclusively appeared at the trial that all independent brokers in San Francisco receive similar commissions. This does not constitute the broker an agent of the insurance company. (United Firemen's Ins. Co. v. Thomas, 92 Fed. 127 (47 L. R. A. 450, 34 C. C. A. 240); McGraw Woodenware Co. v. German Fire Ins. Co., 126 La. 32 (20 Ann. Cas. 1229, 38 L. R. A. (N. S.) 614, 52 South. 183).)"

The remarkable similarity of facts of the *Solomon* case to this case should be noted. Bishop occupied the same position there as Matthias did in this case, except that Bishop apparently was a licensed agent. Gordon & Hoadley occupied the same position as the Nether-

lands in this case. The sole distinction is that this was apparently the only transaction between Gordon & Hoadley and the Federal Insurance Company. And upon this fact alone is based the distinction which appellants attempt to make between that case and that here in question. But the *quantity* of business transacted by a broker under an express agreement of brokerage cannot change the relations of the parties. The Netherlands was a mere broker under its original arrangement with appellee. It must have remained a broker whether it had placed one or one thousand policies with appellee pursuant to the arrangement.

VII.

MATTHIAS WAS NOT AN OSTENSIBLE AGENT OF APPELLEE.

There is no evidence to support a theory that either Matthias or the Netherlands was an ostensible agent of appellee. Matthias had never heard of appellee, nor had appellee ever heard of him. (Deasy, Tr. 76, Matthias, Tr. 103.) Matthias had never received a Consolidated policy for delivery. (Tr. 103.) The Strangios had never heard of appellee; Tom Strangio, who instructed Matthias to secure the insurance for him, did not know what company, if any, Matthias represented. (Tr. 102.)

The Netherlands had offered certain risks to appellee over a period of six months. Upon those accepted a commission had been paid. There is no evidence that appellee had ever by a single act led *anyone,* to say nothing of appellant, to believe that

Netherlands was its agent, or that it would be bound by any act of the Netherlands Company.

To constitute an ostensible agency, the third person (Strangio) must believe that the agent had authority.

C. C. 2334;

Harris v. San Diego Flume Company, 87 Cal. 526.

And that belief must have been generated by some act or neglect of the principal, and not by acts or declarations of the agent.

Harris v. San Diego Flume Company, supra;
Allen v. Wood, 32 Cal. App. 76.

A person relying upon ostensible agency must show at least one specific instance in which a similar act of the alleged agent was authorized or recognized.

Robinson v. Nevada Bank, 81 Cal. 106.

The mere fact that theretofore in previous years and while a licensed agent, Matthias had secured insurance for Strangio, would not make him an ostensible agent with right to bind any and every insurance company in the United States. It could not make him an ostensible agent even of the Netherlands Company beyond mere solicitation of insurance in any event.

Tommasini v. Smith, 26 Cal. App. 227;

Mitrovich v. Fresno Fruit Packing Company, 123 Cal. 379;

McCord Furniture Company v. Woolpert, 89 Cal. 271.

This case lacks every necessary fact element to constitute an ostensible agency.

Armstrong v. Barceloux, 34 Cal. App. 433.

VIII.

MATTHIAS WAS NOT AN AGENT BY RATIFICATION.

Appellant's argument on the theory of ratification must of course assume that Matthias had no antecedent authority to represent appellee. If he had antecedent authority, no ratification would be necessary. The policy was issued on the telephonic application of Netherlands Insurance Company (Gorham, Tr. 89), and it does not appear from the record that at the time of its issuance, appellee had any knowledge whatsoever of Matthias' existence. There was nothing in the transaction to put appellee upon inquiry as to whether any soliciting agent or sub-agent of Netherlands had purported to act as a general agent of appellee with general powers. It therefore had no knowledge or notice of what, under appellant's theory, it was supposed to be ratifying, and had it made inquiry of the Netherlands as to the source of the application for the policy, it could only have been told that the application had come from Strangio Bros. and not from a licensed agent of the Netherlands. Inasmuch as the information as to the occurrence of the accident did not reach the Netherlands until after the issuance of the policy, inquiry at the Netherlands' office at the time the policy was issued would have produced no information. These facts take the case out of the rule of *Hutchinson v. Gould,* 180 Cal. 356, cited by appellants.

It is an elementary principle in the law of agency that there can be no ratification unless the principal knew the facts. Declarations of the California Courts to this effect since *Billings v. Morrow,* 7 Cal. 172, 68

Am. Dec. 235, have been so uniform and have covered such a wide variety of subjects that little remains to be said upon the subject.

Dupont v. Wertheman, 10 Cal. 354;
Bloom v. Coates, 190 Cal. 458;
Blen v. Bear River, etc., Water & Mining Company, 20 Cal. 602, 81 Am. Dec. 132;
King v. LaGrange, 50 Cal. 328;
Dean v. Bassett, 57 Cal. 640.

In order to constitute a ratification of the unauthorized acts of an agent, the principal must be fully advised of the actual facts of the transaction had by the agent, which the principal by his acts or conduct is to be held to have ratified.

Hutchison v. Scott, Magner & Miller, 35 Cal. App. 171.

While it is true that ratification of the acts of an agent need not be express, but may be implied from the acts and conduct of the party, it is an essential element of ratification that a party to be charged with responsibility must have had full knowledge of what the agent has done.

Allen v. San Francisco Wholesale Dairy Produce Exchange, 59 Cal. App. 93.

A confirmation or ratification of the unauthorized acts of an agent, in order to be made effectual and binding on the principal, must be made with a full knowledge or its equivalent of all material facts. Ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve

the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. *Prima facie* proof of ratification necessarily involves some proof that the one charged had knowledge of the facts. Upon a counter showing if it is claimed that there was any mistake or misapprehension, the party who claims a mistake or misapprehension, must so prove.

Laack v. Dinmick, 95 Cal. App. 456.

Furthermore, the policy itself expressly provides:

> "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed an agent of the company."

IX.

BY DATING BACK THE POLICY TO OCTOBER 18th, 1930, APPELLEE DID NOT WAIVE THE CONCEALMENT.

Appellants predicate their argument on this point upon the following statement:

> "The voluntary act of appellee pursuant to its custom in dating back the policy so that it should cover a period of one year commencing October 18th, 1930, was an assumption of risk of all accidents between that date and October 20th, 1930, when the policy was executed. There was therefore no duty on the part of the assured to communicate an accident taking place between these dates." (Br. p. 24.)

This is not a correct statement of the law, and none of the cases cited by appellant so hold. Appellants argue that by dating the policy October 18th and

thereby starting the premium period as of that date, appellee assumed liability for all losses, *known or unknown,* contingent or certain, that occurred subsequent to the date of the policy. This argument can only be advanced by disregarding the most elementary principles of insurance law.

Insurance is not an agreement whereby for a small premium the insurer assumes and agrees to pay a known and established loss or liability. It is a contract of indemnity against contingent or unknown events. It may be either past or future.

Cal. Civil Code, 2531.

By agreement of the parties, the insurance may be made to attach as of a time past.

Anderson v. Mutual Life, 164 Cal. 712,

or in the future.

Victoria Steamship Company v. Western Assurance Company, 167 Cal. 348.

Regardless of when the insurance is to *attach,* the law requires both the insurer and the insured to act in the highest good faith and *at the time the agreement is made,* regardless of its effective date, each to disclose to the other all material facts then known affecting the risk. It does not require the disclosure of the *unknown* and does not require a statement of opinion. It does strictly require a revelation of *known* facts. The question *whether there was a concealment is not determined as of the time the risk attaches, but as of the time the contract is entered into whereby the risk attaches, whether it attaches at one time or another.*

It is obvious in this case that the contract of insurance was made on Monday, October 20th (if it can be said that the minds of the parties ever met and a contract was made at all). It was at that time that the duty rested upon the insureds through the agencies chosen by them to secure the policy, to disclose to the insurer, any facts affecting the insurer's liability under the policy that were known to the insured and not known to the insurer.

Appellants' theory, epitomized in appellee's brief in the language quoted *ante,* namely, that by backdating the policy, appellee assumed all risks of accident subsequent to the date of the policy regardless of the law of concealment, is highly fantastic in the law of insurance, to say the least. In support of this theory, appellants cite a series of cases that are all decided upon the same ground, namely, that the contract had been made and the insurance had attached as of a time previous to the loss; at the time the contracts were made, there was no concealment. Stated in another way, these cases all involve fact situations where the policy involved was negotiated, the minds of the parties met on a contract of insurance effective as of a certain date, the policy to be issued at a later date. In each case a loss ensued after the closing of the contract of insurance and before the issuance of the policy.

In the case of *Hallock v. Insurance Company,* 26 N. J. Law 258, no question of fraud, concealment or misrepresentation was raised at all. A policy of insurance was issued in Jersey City as of 12:00 o'clock

noon on the 13th, on property in Steuben County, New York, to attach as of 12:00 o'clock noon on the 10th. The property was destroyed by fire at 8:00 A. M. on the 13th. The question considered and decided was "is a contract to insure against fire from a time past void in law." (Op. 275.) The opinion further expressly puts concealment out of the case.

> "As to the first point, the policy is not dated, but it was signed on the 13th of March, at noon. The fire happened about two hours before. The policy, by its express terms, insures the building from the 10th of March, 1855, at noon, to the 10th of March, 1856, at noon. There is raised no question of fraud, concealment, or misrepresentation.
>
> So far as appears by the case, when the policy was signed *both parties were equally ignorant of the fire.*" (Italics supplied.)

Both parties were not equally ignorant of the loss in this case. Strangio knew of it in ample time to have notified the insurer had he acted with the slightest diligence.

In the *El Dia* case a telegraphic binder had been given antedating the loss.

These and other cases decided upon similar facts and which were cited by appellants on this point, are fully answered, cited and distinguished in the late case of *Springfield Fire & Marine Insurance Company v. National Fire Insurance Company,* 51 Fed. (2nd) 714. That case presents a remarkable situation of a fire commencing just a few minutes before policies of insurance theretofore negotiated were by their

very terms to attach. In considering the question of whether in the few minutes intervening between the time the policies were to attach and the breaking out of the fire, the duty rested upon the insured to get word to the company of the impending loss, and considering the question of concealment generally, the Court said:

> "Thus, in marine insurance where the policy is to take effect on a certain date and covers a vessel 'lost or not lost,' the policy takes effect on the day named even though the vessel was lost at the time the policy was made." (Citing authorities.)
>
> "And in fire insurance, where a policy is executed on a given date, but is antedated as to the commencement of the risk, the policy is valid and effective, even though the property covered was destroyed by fire prior to the actual making of the policy, *but within the period of the antedated risk.* Eldia Insurance Company v. Sinclair, supra; Hallock v. Commercial Insurance Company, 26 N. J. Law, 268; Id. 27 N. J. Law, 645, 72 Am. Dec. 379; Security Fire Insurance Company v. Kentucky Insurance Company, 7 Bush (Ky.) 81, 3 Am. Rep. 301.
>
> "However, in the case of marine insurance policies 'Lost or not lost,' and *in the case of fire insurance policies where the period of risk antedates the making of the contract, there is the implied condition that the party insured does not know at the time of securing the policy that the property insured has already been destroyed.* Mercantile Mutual Insurance Company v. Folsom, supra; Eldia Insurance Company v. Sinclair, supra; Security Fire Insurance Company

v. Kentucky Insurance Company, supra. See Wales v. New York and Ft. Worth Insurance Company, 37 Minn. 106, 109, 33 N. W. 322. * * *

"it is well settled that an applicant for insurance must use due and reasonable diligence to disclose to the insurance company all facts affecting the risk which arise after his application has been made, and before the contract has been consummated. Thus, in M'Lanahan v. Universal Insurance Company, 1 Pet. 170, p. 185, 7 L. Ed. 98, which was an action on a policy of marine insurance, the court discussing the principle under consideration used the following language: '* * * where a party orders insurance and afterwards receives intelligence material to the risk, or has knowledge of a loss; he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits to do so, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void.' (Citing cases.)"

"But the rule thus established does not require the insured to use extraordinary diligence or employ extraordinary means to inform the insurance company of any changes in the risk which have taken place during the negotiations and before the policy has attached. It was held in Neptune Insurance Company v. Robinson, 11 Gill & J (Md.) 256, that an applicant for insurance was not required to use all possible means of acquiring information material to the risk up to the last instant of time; and that, therefore, his failure to call at the postoffice where a letter was re-

> ceived on the morning of the day that he effected insurance upon a vessel, in which letter the captain of the vessel informed him that she had been lost, did not vitiate the policy." (Italics ours.)
>
> *Springfield Fire and Marine Insurance Company v. National Fire Insurance Company et al.,* 51 Fed. (2nd) 714.

No extraordinary diligence was required of the assured or their agent in this case. An ordinary letter or postcard on Sunday afternoon to the Netherlands advising of the accident would have been sufficient. A telegram or telephone call on Monday would have sufficed.

All of the cases cited in support of appellants' theory (Br. pp. 24-33), fall in the class of the *El Dia* case, and are fully distinguished by the fact that in those cases the minds of the parties had met upon a contract of insurance *before* the loss, whereas in this case if they could be said to have met at all, it was *after* the loss, and the fact of the loss was concealed from the insurer.

Appellants attempt to confound us on this point by propounding the following question: "We again request opposing counsel to state in his reply brief for what service a proportionate premium charge was made in this case between October 18 and October 21." (Br. p. 27.)

Propounding this question after the full discussion of this case in the Court below and after reading the cases which counsel must have read in the writing of appellants' brief, is ingenuous, to say the least. The

insurer in this case, as in most cases, knew nothing whatever about the automobile insured, where it was or to what use it was being put. It might have been upon an extended trip in some eastern state, under the control of some member of the Strangio family. Had it been and had there been a loss subsequent to Saturday, October 18th, the effective date of the policy, and had knowledge of this loss not come to the assured until after the issuance of the policy, there would, of course, have been no concealment, and the premium would have been for the risk from the 18th of October, 1930, to the 18th of October, 1931. That is precisely what the law of concealment contemplates, that at the time the minds of the parties meet upon the contract of insurance, the assured shall communicate all facts affecting the risk to the insurer that are known to the insured and unknown to the insurer.

X.

THERE IS NO PREJUDICIAL ERROR IN THE RECORD.

Appellants argue that exceptions two, three and five and assignment of error number five are well taken.

Exception two is to a refusal of the Court to strike an answer of Mr. Deasy brought out on cross-examination.

The answer standing alone might be deemed a conclusion of the witness but taken in connection with the testimony that preceded and followed it, the answer was fully explained. The entire matter

of handling claims and notices of claims and losses was fully developed. It must be clear to the Court that the notice of loss must be viewed in two aspects. One is the technical matter of complying with the policy requirements that notice of loss must be given within a limited time. For this purpose the notice was not recognized until it reached the company. In other words, it must be actual and not constructive notice. The witness' ideas in this regard happen to be at variance with the decision of this Court in the case of *General Acc. etc. v. Caldwell* but none the less for what they were worth, they were his ideas and he was testifying to the practice actually followed by the company.

Secondly there is the practical matter of investigating and handling the claim after the loss has occurred and knowledge thereof has come to the insurer. For this latter purpose, the company welcomed any information that an accident had occurred to its assured whether it came from the assured, his broker or a policeman on the corner. The transcript contains the following in this connection:

> "I am not sure whether notices of loss coming under these policies came to us through the Netherlands Insurance Company or directly from the claimants. The general practice, however, was that these notices would come to us from both sources. Mr. Hayne then asked this question: 'And from whatever source it came you recognized it as a notice or loss?', to which the witness replied: 'Yes, but bear in mind that in this case, in an insurance contract, if I may deviate, and it won't be out of order, so I can per-

haps better answer your question, you have fire, theft and collision insurance and sometimes property damage insurance, upon which, as a general rule, *the authority for the adjustment of such losses is generally delegated to the agents. So that notice of loss to an agent in those cases becomes, as a matter of fact, notice to the company because of the fact that generally speaking, the agents would have authority to negotiate settlements of such losses.* However, under public liability, the exceptions are very, very few, and where there are exceptions *they are generally arranged by written contract with the agent,* for the adjustment of any public liability claims so that in all cases herein, the Consolidated Indemnity & Insurance Company didn't accept any notice of loss under public liability policies until that notice had actually reached its own claim department." (Deasy, Tr. 80.)

"I do not know whether a majority of notices of loss on public liability policies were received through the Netherlands or not. It did not make much difference to us, as the important thing was to have the claim received by our claim department." (Deasy, Tr. 82.)

"When Mr. Gorham and I spoke with regard to our arrangements for writing business from his office we referred to claims and Mr. Gorham agreed that the Netherlands Insurance Company would cooperate in quickly forwarding to us any notice of claim that they might receive in their office. In public liability claims the manner of transmitting notice of loss does not mean anything; it does not make much difference." (Deasy, Tr. 84.)

"My company had a claim department to investigate public liability and damage claims.

> Claims are handled just the same, no matter how the notice of loss comes to the company." (Deasy, Tr. 85, 86.)

Taken in connection with its context, it is apparent that all the witness was testifying to was that it made no difference how the notice of loss reached the office of appellee, the important thing was for appellee to get the notice. And neither the witness nor appellee regarded a notice of loss as notice to the company until it actually reached the company, save in those cases where general agents had been authorized by contract to adjust claims.

It should be noted that the Court permitted inquiry of *all* witnesses on very broad lines. (See testimony of Matthias, Tr. 107-108.)

Exception number three is to an obviously proper question.

The whole purpose of the trial was to ascertain whether there had been a concealment of a material fact. That fact had been communicated to Matthias, but not to anyone else. It was apparent from the answer of defendants, complaints in intervention, answers to interrogatories, and opening statements that it was contended by appellants that Netherlands was an agent representing appellee and not a mere broker representing the assured; that Matthias was a subagent of the agent, likewise representing appellee and not representing the assured. Upon cross-examination by one of appellants' solicitors, the witness had been questioned as to custom and usage between companies and brokers in San Francisco in regard to various phases of the business and the practice in

carrying it out. On redirect, the practice of the companies in handling business was gone over in detail, and then the question was asked whether there was any difference between the manner of handling the business between the offices of the Netherlands and appellee and that of any other broker. It could be argued by appellee that in view of the express contract between appellee and Netherlands the whole question of usage, custom and practice was inadmissible, but upon the state of the record when the question was asked it was obviously a proper question.

Appellants' exception number five is to an objection sustained by the Court *suo sponte.*

The witness Gorham, testifying on redirect examination, said:

> "A broker usually functions in this way: first the broker will obtain from his client a line of insurance and submits it to whatever company he wishes to do business with or whatever company he is in the practice of doing business with. If the line is acceptable to the company it will write and deliver the policy to the broker who will deliver it to his client. An agent obtains business from his client in the same way and places it in the company which he is agent for. Agents sometimes issue binding slips. A broker has to submit insurance to the company for final action."

Mr. Hayne then asked:

> "Then the only two reasons why you say the Netherlands Insurance Company was a broker instead of an agent of the Consolidated Indemnity & Insurance Company was, first, because it had

> no agent's license, and secondly, because they weren't authorized to issue policies themselves, that is, the Netherlands, not authorized to issue policies of the Consolidated Indemnity & Insurance Company."

Whereupon, without objection from complainant, the Court said:

> "This is just argument. He has said positively that they didn't enter into an agreement of that kind, so I don't see any reason for the question. We are just arguing the case. He has stated positively they were not agents, and he is the one who made the negotiations. He is either telling the truth or he is lying."

The question called for no statement of fact and was clearly argumentative. It was not error to disallow it.

As to appellant's assignment of error number five (argued Br. p. 40), appellants' argument merely begs the question.

The question is not whether there was a concealment when the policy *attached,* but, was there a concealment when the contract was *made.* Appellants contend under their theory of agency that it was *made and* attached October 18th, prior to the accident. Appellee contends that it was made October 20th, to attach as of the 18th; that it was so made by reason of the concealment. Whether there was a concealment depends on the construction placed by the Court on the relation of the parties: the Netherlands to appellee and Matthias to the Netherlands to appellee. This has been fully briefed above.

XI.

CONCLUSION.

We submit that a clearer case of concealment could not be made. Matthias, unlicensed and unknown to appellee, can only be regarded as an emissary of Strangio Bros. for the purpose of securing the insurance. Had he been a bookkeeper or office boy for the Strangios told to get insurance on the car he would stand in the same identical legal relation to them. The Netherlands was a mere offering broker and in the premises represented the Strangios, and not appellee. If the Strangios chose this chain of agency to secure insurance, the manner in which it functions is their concern and responsibility and theirs alone.

The fact concealed is stipulated to have been material to the risk. (Tr. 99.)

Good conscience and fair dealing required the assureds, through their chosen chain of agency, to communicate the fact of the loss with reasonable diligence. This obviously was not done. Had their agent Matthias, used the same degree of diligence and means of communication he used in transmitting the application, there would have been no concealment. The decree of the Court below was equitable and followed the law and should be affirmed.

Dated, San Francisco,
March 31, 1933.

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